

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

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In the Matter  
of

The Application of JOSEPH E. LEVINE, a Bankrupt,  
*Petitioner-Appellant,*

To Have a Certain Judgment in Favor of JACK LEVINE,  
*Respondent,*  
Cancelled of Record.

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**Brief in Support of Petition for Certiorari.**

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**Statement.**

The essential facts are stated in the petition. The opinion of the Supreme Court of the State of New York in which the application to vacate and discharge the judgment is denied appears at page 20 of the record. The opinion of the Appellate Division of the Supreme Court on the motion to vacate the said subpoena appears at page 15 of this brief. Exhibit A, which is a part of the record herein is the record on appeal on the motion to vacate the subpoena in supplementary proceedings and contains (1) the decision referring the issues to an Official Referee (fols.

123  
 368, 369), (2) the report of the Official Referee (Exhibit A, fols. 748-755), (3) the decision confirming said report (Exhibit A, fols. 767-759), and (4) the order denying the motion to vacate the subpoena (Exhibit A, fols. 385-393). 29-131

### **Jurisdiction.**

The order of the Court of Appeals denying leave to appeal was entered on June 11, 1942.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended.

### **POINT I.**

**Certiorari should be granted by the Supreme Court to review the order denying cancellation of the judgment discharged in bankruptcy. There was no willful and malicious injury to respondent's property within Subdivision 2 of Section 17 of the Bankruptcy Act as construed by this court.**

The relevant portion of the Bankruptcy Act is Section 17, which provides:

“A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (second) are liabilities . . . for willful and malicious injuries to the person or property of another . . .”

The material portion of Section 150 of the Debtor-Creditor Law of the State of New York provides:

“At any time after one year has elapsed since a bankrupt was discharged from his debts, pursu-

ant to the acts of congress relating to bankruptcy, the bankrupt, his receiver, trustee or any other interested person or corporation, may apply, upon proof of the bankrupt's discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it therein, for an order, directing the judgment to be canceled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be canceled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same, by marking on the docket thereof that the same is canceled and discharged by order of the court, giving the date of entry of the order of discharge."

This Court may examine the circumstances of this case to determine for itself whether there was a willful and malicious injury to respondent's property by petitioner. *Davis v. Aetna Acceptance Corp.*, 293 U. S. 328.

The record in this case is barren of any proof of a tortious injury to respondent's property (Exhibit A, ~~fol. 394-747~~<sup>fol. 122-349</sup>). All that was proved was an inability to repay a debt conceived in and arising out of an admitted agreement to receive and invest money (Exhibit A, ~~fol. 494-512~~<sup>fol. 122-349</sup>). There was no requirement that petitioner segregate respondent's money as received (Exhibit A, ~~fol. 444~~<sup>fol. 122-349</sup>). Grievous and unfortunate, as it may have been, petitioner's default at most was a failure to repay a fraternal obligation, expressed in the terms of debtor-creditor (Exhibit A, ~~fol. 420, 634-635~~<sup>fol. 122-349</sup>).

Such a failure to repay is not a willful and malicious injury to petitioner's property. Neither does the fact

that respondent may have in effect waived a right to sue in contract for money had and received and sued for a **conversion** transform the injury into one that is malicious and willful.

Maliciousness or willfulness are not essentials of the cause of action for conversion. Mere appropriation, no matter how conceived, of another's property is sufficient to constitute a tort. It must accordingly be shown that there are aggravated features of the conversion. *Davis v. Aetna Acceptance Co.*, *supra*. It must be marked by the wantonness and *animo furandi* of a larceny. *McIntyre v. Kavanaugh*, 242 U. S. 138. Simple conversion without more does not taint the debt with non-dischargeability under Section 17, subdivision 2 of the Bankruptcy Act.

As to these simple principles this Court said in *Davis v. Aetna Acceptance Corp.*, *supra*, at page 333:

"The respondent contends that the petitioner was liable for a wilful and malicious injury to the property of another as the result of the sale and conversion of the car in his possession. There is no doubt that an act of conversion, if wilful and malicious, is an injury to property within the scope of this exception. Such a case was *McIntyre v. Kavanaugh*, 242 U. S. 138, 61 L. ed. 205, 37 S. Ct. 38, 38 Am. Bankr. Rep. 165, where the wrong was unexcused and wanton. But a wilful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without wilfulness or malice. *Boyce v. Brockway*, 31 N. Y. 490, 493; *Laverty v. Snethen*, 68 N. Y. 522, 527, 23 Am. Rep. 184; *Wood v. Fisk*, 215 N. Y. 233, 239, 109 N. E. 177, 35 Am. Bankr. Rep. 46; *Stanley v. Gaylord*, 1 Cush. 536, 550, 48

Am. Dec. 643; *Compau v. Bemis*, 35 Ill. App. 37; *Re De Lauro* (D. C.) 1 F. Supp. 678, 679, 20 Am. Bankr. Rep. (N. S.) 481. There may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one \* \* \* The discharge will prevail as against a showing of conversion without aggravated features."

Prior to the decision in the instant case this had also been the interpretation and application of Section 17, subdivision 2 by the Courts of New York. *Ulner v. Doran*, 167 App. Div. 259, at pages 261-262, Appellate Division, First Department:

"The merely constructive fraud and malice which is sometimes said to follow upon the fact of conversion is not sufficient to prevent the discharge of the indebtedness whether it has been reduced to judgment or not. (*Maxwell v. Martin*, 130 App. Div. 80; *Lewis v. Shaw*, 122 id. 96; *Collier Bankruptcy* [10th ed.] 387.) We think, therefore, that the judgment debt was discharged by the discharge in bankruptcy."

See also, *Johnston v. Bruckheimer*, 133 App. Div. 649, at page 653, Appellate Division, First Department:

"In all of these cases the acts under consideration involved moral turpitude and under such circumstances it was not difficult to find malice, but the same cases pointed out that there are torts which would not be of such a nature as to involve malice, as, for instance, negligently running over a

person in the public streets, while intentionally riding down a particular person would, of course, be malicious and, therefore, come within the rule."

Enough has been shown by these citations to indicate the meaning of the phrase, "willful and malicious injury to property," when related to conversion as previously understood and applied in New York.

As those words are used in the Act they mean not a technical conversion, but conduct which involves moral turpitude and which is nothing less than larceny. The bankrupt who has been guilty of conversion and no more will be discharged of his obligation in the Bankruptcy Court. But if he has acted as a thief, the discharge avails him nothing. A demonstration that he has been guilty of conversion, but that his conduct is not that of a thief, will not bar his discharge. All of the cases can be rationalized and explained only in relation to this simple statement of the law. The case of *McIntyre v. Kavanaugh*, 242 U. S. 138, much relied upon below by the respondent, is consistent with this statement. The brokers in that case had accepted the deposit with themselves of securities valued at \$25,000, against a loan application of their customer, McIntyre, in the sum of only \$3,000. Within nine days they had secretly and evasively repledged three-fourths of all the stock and they had disposed of all of it within five weeks. As the Appellate Division (128 App. Div. 722) said of their conduct:

"In short, the acts disclosed constituted larceny."

In the statement of the case which was reviewed in the Court of Appeals of the State of New York, *Kavanaugh v. McIntyre*, 210 N. Y. 175, at page 176, there is this significant sentence:

"Nothing further appears as to the nature of the account, but the Court refused to find that the securities were deposited on margin."

Again at page 182 that Court said:

"It is very significant that the defendants against whom the judgment was rendered went on the witness stand but made no attempt to justify or excuse the acts of the firm. These facts show that the conversion of the stock and scrip was not merely technical nor committed in the assertion of a mistaken claim to the property. It was a wrongful act done intentionally without just cause or excuse, and constituted willful and malicious injury to the plaintiff's property as those words are used in section 17 of the Bankruptcy Law."

The opinion of this Court said in part:

"To deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury thereto within common acceptance of the words."

The counterpart of *McIntyre v. Kavanaugh* is *Brown v. Garey*, 267 N. Y. 167 (certiorari denied, 296 U. S. 615). There the defendant brokers without the shadow of right repledged securities which they had no authority to pledge, and shortly thereafter, falling into financial difficulties, were petitioned into bankruptcy and, of course, were unable to return the securities or their value, but there was absent from the case any showing of a guilty intention or of evasive conduct and a failure of proof that the partners in the brokerage firm actually intended to sell their customer's property. The Court of Appeals held that the debt was dischargeable. It said at page 171:

"Giving the plaintiff the benefit of all inferences which may be drawn from the evidence, the most that can be said is that the conversion was the result of negligence. The burden which rested upon plaintiff (*Kreitlein v. Ferger*, 238 U. S. 21) to show that the defendants either directly or vicariously pledged plaintiff's stock intentionally, without just cause or excuse and knowing that it would necessarily cause him harm, has not been met."

In *Wood v. Fisk*, 215 N. Y. 233, the Court of Appeals held that the repledge by brokers of securities for a sum in excess of their authority to pledge, constituted conversion, but that nevertheless the resulting obligation was discharged by bankruptcy proceedings because there had been no proof of such aggravated circumstances as would permit of the conclusion that the conduct of the defendants was larcenous. The Court said at page 240:

"We held in *Kavanaugh v. McIntyre* (128 App. Div. 722; 210 N. Y. 175) and again in *Andrews v. Dresser* (214 N. Y. 671) that there may be acts of conversion so wanton as to be included in that exception. Those were cases where the charge of conversion was equivalent to a charge of larceny. We think the misuse of the plaintiff's securities is not to be classified as a willful and malicious injury within the meaning of that statute (*Johnston v. Bruckheimer*, 133 App. Div. 649; *Allen v. Fromme*, 195 N. Y. 404, 407). The repledge unlike a sale, left the general property in the plaintiff; it gave rise, until followed by bankruptcy, to nominal damages only; and so far as there was any willful conversion, it was, therefore, partial and technical rather than absolute and malicious."

And it must always be remembered that presumptively an obligation scheduled in bankruptcy petitions has been discharged and that the burden of proof is on the objec-

tor to demonstrate the contrary. *Kreitlein v. Ferger*, 238 U. S. 21; *Brown v. Garey*, 267 N. Y. 167. There was no attempt to assume that burden by the respondent herein, nor could such an effort be made. There was no misconduct by the debtor in receipt of the moneys from the creditor; there was no evasiveness by him in the handling of those moneys. On the contrary, there was always a complete revelation by the debtor to the creditor of the debtor's dealings with the moneys which he had received from him (Exhibit A, ~~fol. 414-426~~<sup>fol. 131-132</sup>). There is, therefore, no basis here for saying that the conduct of this appellant was tantamount to the commission of the crime of larceny and yet the Appellate Division held by its opinion that the conduct of the appellant resulted in willful and malicious injury to property. That holding is justified only if that Court could condemn his conduct as that of a thief. It is respectfully submitted that it could not and should not have done so on the record and that, therefore, the decision denying the cancellation of the judgment was erroneously made and is in conflict with the law as declared by this Court.

Since the appellant's debt was discharged, unless his conduct in incurring the obligation or in failing to repay it was tantamount to larceny, and since there is no showing of even bad faith on his part in assuming the obligation in the first instance, and nothing worse than misfortune in his inability to repay, the determination by the State Courts was erroneously made, and appellant ought be permitted to appeal to this Court so that it may exercise its power finally to conform the law of New York with that declared by this Court.

Respectfully submitted,

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*Attorneys for Petitioner-Appellant.*

JESSE CLIMENKO,  
*Of Counsel.*

**Opinion of Appellate Division.**

N. Y. LAW JOURNAL

*Levine v. Levine*

May 6, 1941.

By LAZANSKY, CARSWELL, JOHNSTON, ADEL &amp; TAYLOR

*Matter of Levine, res. (Levine, ap.)*—In proceedings supplementary to judgment, the judgment-debtor moved to vacate a subpoena served upon him for his examination upon the ground that the obligation referred to in the subpoena had been discharged in bankruptcy and for an order adjudging that the obligation referred to in the subpoena was discharged in bankruptcy. The holding by Special Term, in confirming the report of the official referee was that there was a trust relationship between the debtor and the creditor within the meaning of section 17, subdivision 4, of the Bankruptcy Act. That subdivision applies only to express trusts (*Davis v. Aetna Acceptance Co.*, 293 U. S. 328, at p. 333). The proof clearly shows that there was a willful and malicious conversion of the judgment-creditor's property by the judgment-debtor so that the judgment by confession entered for such conversion was not a debt dischargeable in bankruptcy under subdivision 2 of section 17 of the Bankruptcy Act, by which are except "Liabilities \* \* \* for willful and malicious injuries to the \* \* \* property of another \* \* \*." Order of April 5, 1941, resettling order of February 18, 1941, confirming report of official referee, &c., affirmed with \$10 costs and disbursements; examination of the judgment-debtor and of Ashenfelter & Morrow, by George C. Morrow, to proceed on five days' notice.